

STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT

NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION
DRINKING WATER BUREAU,

Complainant,

v.

FRED WHISTLE,

and

ANIMAS VALLEY LAND AND WATER COMPANY,

Respondents.



No.

DWB 16-22(CO)

**ADMINISTRATIVE COMPLIANCE ORDER AND
ASSESSMENT OF CIVIL PENALTIES**

1. Pursuant to the Environmental Improvement Act ("EIA"), NMSA 1978, § 74-1-10, and the Drinking Water Regulations, 20.7.10 NMAC, the Secretary of the New Mexico Environment Department ("NMED"), acting through the Director of the Water Protection Division of the NMED, issues this Administrative Compliance Order with Penalties to Fred Whistle and Animas Valley Land and Water Company ("Respondents") to enforce the EIA and Drinking Water Regulations.

FINDINGS

2. The NMED is an executive agency within the government of the State of New Mexico and is charged with administration and enforcement of the EIA and Drinking Water Regulations. NMSA 1978, §§ 74-1-7(A)(2) and -10; 20.7.10 NMAC.

3. The EIA authorizes NMED to assess a penalty which shall not exceed one thousand dollars (\$1,000) for each violation per day. NMSA 1978, §§ 74-1-10(C).

4. Respondent Animas Valley Land and Water Company (“AV Water”) owns and operates the Morningstar public drinking water system (“System”), PWS# NM3511524, located in San Juan County, New Mexico.

5. The System serves fewer than ten thousand (10,000) customers.

6. Respondent Whistle is the general manager of and administrative contact for the System.

7. Each Respondent is a “person” as defined by NMSA 1978, § 74-1-3, and 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.2].

8. The System is a public water system, because it serves at least fifteen (15) service connections or regularly serves twenty-five (25) persons at least sixty (60) days per year. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.2].

9. At all relevant times for this Order, the System was providing drinking water to its customers from a surface water source.

10. At all relevant times for this Order, Respondents were required to treat the water produced by the System by filtration. 20.7.10.100 NMAC [incorporating 40 C.F.R. §§ 141.71, 173].

11. At all relevant times for this Order, the System provided conventional or direct filtration.

12. Public water systems that treat water by filtration are required to monitor the turbidity of “representative samples” of the system’s treated water. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.74(c)(1)].

13. Turbidity is used to assess drinking water quality because it is an easily measured and cost effective proxy for the ease with which the water can be disinfected. The more turbid the water, the harder it is to disinfect.

14. For the purpose of the Drinking Water Regulations, turbidity is measured in Nephelometric Turbidity Units (“NTUs”). 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.13 and 40 C.F.R. Subpart Q, Appendix C.]

15. Each day, the turbidity of the finished water is measured at least every four hours. 20.7.10.100 NMAC [incorporating 40 C.F.R. §§ 141.74(c)(1), 173].

16. The turbidity of a system’s filtered water must be less than or equal to 0.3 NTU in at least 95% of the measurements taken each month and may not exceed 1 NTU at any time. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.551].

17. By the tenth (10th) day of each month following a month in which a water system provides water to the public, a public water system using conventional or direct filtration to treat surface water must report certain turbidity measurements to NMED. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.570].

18. Respondents are required to report the System’s turbidity measurements to the NMED’s Drinking Water Bureau (“DWB”) each month on a Monthly Operating Report (“MOR”). The MOR reports the maximum daily turbidity reading for finished water that leaves the treatment facility for distribution to customers. 20.7.10.100 NMAC [incorporating 40 C.F.R. §§ 141.551(a) and 141.570].

19. At all times relevant to this Order, the System used an online HACH 1720E turbidimeter that continuously monitors the turbidity of the water leaving the treatment plant and going into the distribution system.

20. On May 26, 2016, NMED DWB employees Peter Nathanson and Martin Torrez conducted a site visit at the System, with the purpose of providing technical assistance. The visit was in response to a number of complaints from customers of the System about dirty discolored water at their taps.

21. During the May 26, 2016 visit, Mr. Nathanson and Mr. Torrez met with Respondents' employees, Mr. Jose Grijalva, a Level 3 certified operator, and Mr. Thomas Barrow, a Level 2 certified operator. Mr. Grijalva and Mr. Barrow are the only two (2) certified operators employed by Respondents.

22. Mr. Nathanson and Mr. Torrez decided to review MORs for the System to determine whether a turbidity problem could be the cause of the customer complaints about dirty discolored water.

23. Mr. Grijalva showed Mr. Nathanson a MOR for May 2016 that was attached to the clipboard he was carrying. This MOR contained turbidity data for each day of the month, up to and including the day of the visit, May 26, 2016. All entries on this MOR were nearly the same, around 0.214 NTU.

24. Mr. Nathanson noticed a second partially completed MOR on Mr. Grijalva's clipboard, partially under the MOR for May 2016, and asked Mr. Grijalva about the two MORs. Mr. Grijalva replied that one was for May 2016 and the other was for the next month.

25. Mr. Nathanson questioned Mr. Grijalva about how he could have a MOR with completed entries for a month that had not yet occurred. At this time, Mr. Grijalva removed the partially completed MOR for June from the clipboard and crumpled it up.

26. At no time during Mr. Nathanson and Mr. Torrez's visit did they observe a turbidity reading on the HACH 1720E that measured less than 2 NTU.

27. Mr. Torrez used DWB turbidimeter that had been correctly calibrated to conduct an independent turbidity measurement at the System, which returned a measurement of 3.07 NTU.

28. Based on findings from the technical assistance site visit by Mr. Nathanson and Mr. Torrez, four other NMED DWB employees (Joe Martinez, Chris Cudia, Joe Savage, and Tanya Trujillo) conducted an unannounced inspection at the System on June 2, 2016.

29. While at the System's treatment plant, Mr. Martinez asked Mr. Grijalva to show the DWB employees the HACH 1720E turbidimeter. Mr. Grijalva stated that the HACH 1720E turbidimeter was the only unit that the System had, and that it measured only finished water.

30. Mr. Martinez informed Mr. Grijalva that DWB employees would download data from the turbidimeter, and Mr. Grijalva stated this was fine. Mr. Cudia and Mr. Savage then downloaded the turbidity data onto a Secure Digital ("SD") card.

31. During the inspection, no DWM employees observed the turbidimeter register a reading less than the required 0.3 NTU.

32. Near the end of the inspection, Mr. Barrow arrived. In response to Mr. Martinez's questions, Mr. Barrow stated that Mr. Grijalva operates the treatment plant. Mr. Barrow further stated that Mr. Grijalva provides handwritten MOR information to Mr. Barrow, which Mr. Barrow then types up and submits to DWB.

33. After returning to his office, Mr. Martinez reviewed the data downloaded from the System's HACH 1720E turbidimeter in conjunction with recent MORs that the System had sent to DWB. The recovered HACH 1720E turbidimeter data spanned a time period of November 25, 2015 to June 2, 2016 and provided turbidity readings at an interval of every fifteen (15) minutes.

34. Less than one percent (1%) of the data points from the downloaded turbidity readings matched the turbidity numbers that were reported for the system on MORs from November 2015 to April 2016.

35. No MORs were submitted for the System for May, June, July, or August 2016.

36. No coliform samples were submitted for the System for June 2016.

37. Violation 1: Failure to Report Turbidity Measurements that Exceed Maximum Turbidity Values. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.570] requires public water systems serving fewer than ten thousand (10,000) people to report to the state the date and value of any turbidity measurements taken during the month that exceed the maximum turbidity value, which is 0.3 NTU. Turbidity data recovered from the System's HACH 1720E turbidimeter indicates that turbidity exceeded maximum values every day from November 25, 2015 through April 30, 2016, whereas MORs submitted for the same period reported that the turbidity never exceeded maximum values.

38. Violation 2: Failure to Submit Monthly Operating Reports. 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.570] requires public water systems serving fewer than ten thousand (10,000) people to report turbidity measurements for every month to the state by the tenth (10th) day of the following month. Respondents did not submit MORs for the months of May, June, July or August, 2016.

39. Violation 3: Failure to Submit Coliform Samples for Analysis and Report Results. 20.7.10.100 NMAC [incorporating 40 C.F.R. §§ 141.31(a) and 141.857(b)] requires public water systems serving between five thousand eight hundred one (5,801) and six thousand seven hundred customers to submit seven (7) total coliform samples per month for testing and

subsequently report the results to the state by the tenth (10th) day of the following month. Respondents did not collect or submit coliform samples for the month of June, 2016.

VIOLATIONS

40. VIOLATION 1 – FAILURE TO REPORT TURBIDITY MEASUREMENTS THAT EXCEED MAXIMUM TURBIDITY VALUES. Respondent is in violation of the Drinking Water Regulations, 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.570]. Respondent was required to accurately report turbidity readings to DWB that exceeded maximum values, but failed to do so between on or about November 25, 2015 and on or about April 30, 2016.

41. VIOLATION 2 – FAILURE TO SUBMIT MONTHLY OPERATING REPORTS. Respondent is in violation of the Drinking Water Regulations, 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.570]. Respondent is required to submit completed MORs to DWB by the tenth (10th) of each month for the previous month, but failed to do so for the months of May, June, July, and August 2016.

42. VIOLATION 3 – FAILURE TO SUBMIT COLIFORM SAMPLES FOR ANALYSIS AND REPORT RESULTS. Respondent is in violation of the Drinking Water Regulations, 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.857(b)]. Respondent is required to submit seven (7) coliform samples each month for analysis and subsequently report the results to the state by the tenth (10th) day of the following month, but failed to do so for June, 2016.

ORDERS AND CIVIL PENALTIES

43. Respondent is hereby ordered to pay the following penalties for the violations listed in paragraphs 40 through 42:

a. VIOLATION 1 – FAILURE TO REPORT TURBIDITY MEASUREMENTS THAT EXCEED MAXIMUM TURBIDITY VALUES. Respondent shall pay a penalty of one hundred fifty-eight thousand dollars (\$158,000) within sixty (60) days following receipt of this Order.

b. VIOLATION 2 – FAILURE TO SUBMIT MONTHLY OPERATING REPORTS. Respondent shall pay a penalty of four thousand dollars (\$4,000) within sixty (60) days following receipt of this Order.

c. VIOLATION 3 – FAILURE TO SUBMIT COLIFORM SAMPLES FOR ANALYSIS AND REPORT RESULTS. Respondent shall pay a penalty of one thousand dollars (\$1,000) within sixty (60) days following receipt of this Order.

44. A certified or cashier's check for one hundred sixty-three thousand dollars (\$163,000) made payable to the State of New Mexico shall be sent with return receipt requested by either standard U.S. mail or certified mail to:

Alysia Leavitt
Acting Financial Manager
Drinking Water Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

45. If Respondents fail to comply with the requirements of paragraph 43 of this order, the Secretary of the NMED may assess additional civil penalties for continued noncompliance with this Order.

NOTICE OF RIGHT TO ANSWER AND REQUEST A HEARING

46. Pursuant to NMSA 1978, §§ 61-33-10(E) and 74-1-10(E), and 20.1.5 NMAC, Respondents have the right to request a hearing. If Respondents: (a) contests any material or legal matters upon which this Order is based; (b) contends that Respondent is entitled to prevail

as a matter of law; or (c) otherwise contests the appropriateness of this Order, Respondents may mail or deliver within thirty (30) days of receipt of this Order a written Request for Hearing at the following address:

Hearing Clerk
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

Respondents must attach a copy of this Order to the Request for Hearing. 20.1.5.200.A(2)(d) NMAC.

47. The Request for Hearing shall include an Answer. Respondents' Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Order with regard to which Respondents have any knowledge. Where Respondents have no knowledge of a particular factual allegation, Respondents should so state, and the Respondents may deny the allegation on that basis. Any allegation in this Order not specifically denied shall be deemed admitted. 20.1.5.200.A(2)(a) NMAC.

48. Respondents' Answer shall also include any affirmative defenses upon which Respondents intend to rely. Any affirmative defense not asserted in the Answer, except for a defense asserting lack of subject matter jurisdiction, shall be deemed waived. 20.1.5.200.A(2)(b) NMAC.

49. Respondents' Answer shall be signed under oath or affirmation that the information contained therein is, to the best of the signer's knowledge, true and correct. 20.1.5.200.A(2)(a) NMAC.

FINALITY OF ORDER

50. Pursuant to NMSA 1978, §§ 61-33-10(E) and 74-1-10(E), this Order shall become final unless the Respondents file an Answer and a Request for Hearing with the Hearing Clerk within thirty (30) days of receipt of this Order.

SETTLEMENT CONFERENCE

51. Whether or not a Request for Hearing has been filed, Respondent may confer with the NMED concerning settlement of this Order. The NMED encourages settlement consistent with the provisions and objectives of the EIA and the Drinking Water Regulations. Settlement discussions neither extend the thirty (30) day deadline for filing a Request for Hearing and Answer nor alter the deadline imposed for compliance with the mandate of this Order. Settlement discussion may be pursued as an alternative to, or simultaneously with, the hearing proceedings. Respondents may appear at the settlement conference alone or accompanied or represented by legal counsel.

52. A Stipulated Final Order shall finalize any settlement reached by the parties. The Stipulated Final Order must resolve all issues raised in this Order, shall be final and binding on the parties, and may not be appealed.

53. To explore the possibility of settlement in this matter, contact Maria J. Medina, Drinking Water Bureau, New Mexico Environment Department, P.O. Box 5469, Santa Fe, NM 87502-5469, or (505) 476-8629.

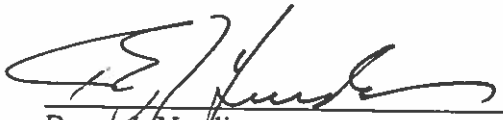
COMPLIANCE WITH OTHER LAWS

54. Compliance with the requirements of this Order does not relieve Respondents of the obligation to comply with all other applicable laws and regulations. This Order does not constitute a waiver, suspension, or modification of the requirements of 20.7.10 NMAC and

20.7.4 NMAC, which remain in full force and effect. Issuance of this Order is not an election by the NMED to forgo any civil or criminal action otherwise authorized under the EIA.

TERMINATION

55. This Order shall terminate when Respondents certify that all requirements of this Order have been met and all penalties paid, and the NMED has approved such certification in writing, or when the Secretary approves a Stipulated Final Order.



Bruce J. Yurdin
Division Director
Water Protection Division
Harold L. Runnels Building
1190 St. Francis Drive
Santa Fe, NM 87502

10/11/2016
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Administrative Compliance Order and Assessment of Civil Penalties" was sent via certified mail, return receipt requested, on the following party of record on October 11, 2016:

Fred Whistle
Harvest Gold Subdivision, NM3511524
P.O. Box 5520
Farmington, NM 87499

/s/ Annie Maxfield
Annie Maxfield
Assistant General Counsel
New Mexico Environment Department